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No. 82-677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC., and DELMAR PHILLIPS,
Appellants,

v.

BEN B. SHAW and RUDY GARZA, as Tax Assessor-Collector of Bexar County, Texas
Appellees.

On Appeal from the Supreme Court of Texas

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

None of the reasons advanced in the appellees' Motion to Dismiss or Affirm are persuasive enough for this Court to decline review of the decision below. The appeal presents a novel and substantial federal question which requires resolution by this Court.

A. By Suggesting That a Refund Suit is Available to a Taxpayer Whose Property Has Been Wrongfully Seized and Sold, the Court Below Improperly Placed the Burden on the Taxpayer to Prove the Impropriety of the Administrative Action.

The court below held the seizure statute constitutional for a variety of reasons, none of which are expressed with particularly great clarity. Although the court recognized that the involved "tax statutes do not provide for a special hearing either before or after the seizure for the taxpayer to contest" the propriety of the seizure or the correctness of the amount claimed, it nonetheless held that due process was not offended. The court's rationale was based on the supposed availability of a refund suit, the ability to bring a suit for a declaratory judgment and the taxpayer's remedy of injunction "to enjoin the collection of the alleged illegal taxes pending a hearing on the legality of same." [J.S. App. 4a-5a] Each of these reasons both begs the question and places on the property owner the responsibility to show the incorrectness of the seizure.

The flaw in the reasoning of the decision below is that in each of these approaches the taxpayer must demonstrate that the seizure should not have occurred, either because the tax is illegal or because of an administrative error on the part of the collector. In the context of an IRS seizure made pursuant to a jeopardy assessment, this Court has held that the burden of proving the propriety of the seizure must be on the taxing authority:

> [T]o permit the Government to seize and hold property on the mere good-faith allegation of an unpaid tax would raise serious constitutional problems in cases, such as this one, where it is asserted that seizure of assets pursuant to a jeopardy assessment is causing irreparable injury. This Court has recently and repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made. Here the Government seized the

> respondent's property and contends that it has absolutely no obligation to prove that the seizure has any basis in fact no matter how severe or irreparable the injury to the taxpayer and no matter how inadequate his eventual remedy in the Tax Court.

Commissioner v. Shapiro, 424 U.S. 614, 629-30 (1976) (footnotes omitted). The collector has also taken the position that he is not required to answer for his actions, and the opinion below would support that position.

After analyzing the language in *Phillips v. Commissioner*, which sustained the validity of the IRS seizure statute where "the opportunity given for the ultimate judicial determination of the liability is adequate",[1] the Court characterized this language as "carefully expressed" dicta. Mr. Justice White, writing for the Court, noted that

> neither the holding nor the dicta in *Phillips* support the proposition that the tax collector may constitutionally seize a taxpayer's assets without showing some basis for the seizure under circumstances in which the seizure will injure the taxpayer in a way that cannot be adequately remedied by a Tax Court judgment in his favor. Instead it would appear to be entirely consistent with our more recent holdings.

Id. at 632.[2] Some kind of "'probable cause'" must be shown justifying the seizure. *Id.* at 633, *quoting North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975).

In the case now at bar there is no statutory provision for the collector to show any sort of reasonable justification for his actions. Indeed, the collector has not demonstrated why a summary seizure was either necessary or justified.

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[1] 283 U.S. 589, 597 (1931).

[2] These "more recent holdings" include *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Although Texas law provides for a seizure where a tax deliquent is about to remove its property from the county,[3] no showing has been made that either Phillips or Querner were about to remove their assets from the county, that they were insolvent, or that any other extraordinary reason existed necessitating the rash action of a seizure.[4] The pendency of tax suits made the collector's actions all the more suspect because it became clear that he did not wish to justify his tax claims before a neutral court.

In addition to making no requirement that the collector explain his actions, the statutory scheme now under review contains no provision for a return of property wrongfully taken nor for a refund of taxes improperly collected.[5] Both

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[3] TEX. REV. CIV. STAT. ANN. art 7268 (Vernon 1960). This statute, also repealed as part of the complete revision of the state's property tax provisions, is now embodied in TEX. TAX CODE ANN. § 33.22(c)(2) (Vernon 1981).

[4] Both taxpayers are still in business at the same locations at which they were operating the time their property was taken. The suggestion made in the Motion to Dismiss or Affirm at 5 that quick action is justified by the inherently movable nature of personal property is simply an afterthought belatedly advanced to justify an unwarrented seizure.

[5] Even if a refund action could be implied, as the collector has argued, it would be less than adequate because of the fact that interest would not be recoverable from the state. This Court, in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), held that the failure of a state to provide for interest on subsequently-refunded tax overpayments did not give rise to an exception to the Tax Injunction Act. This Court did not hold that the failure to provide interest did not render a state court remedy inadequate, nor did it decide that the non-payment of interest would not amount to a taking without just compensation. *Rosewell*, rather, was decided on procedural grounds. *Id.* at 512. But given this Court's holding in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), a very strong case could be made that failure to provide interest is a constitutional deficiency of the allegedly available refund scheme which would render a refund action inadequate.

the appellees and the decision of the court below note that the collector "must hold the property for ten days after seizure" before selling it at public auction and suggest that during this period the taxpayer should mount his legal attack. [J.S. App. 4a] The difficulty with this approach is that the burden of proof is shifted to the taxpayer to show that the collector impermissibly deprived him of his property, rather than placing the burden on the collector to show that there was some "basis for his claim." *Commissioner v. Shapiro*, 424 U.S. 614, 630 n.12 (1976). All of this Court's "more recent holdings" very clearly place this burden on the party seeking the deprivation, where it ought to be. *See Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 606 (1974) (immediate post-seizure hearing provided where seizure would be invalidated unless creditor could prove a basis for the deprivation. In the context of federal tax seizure statutes, it has been observed that "the governing due process principle obliges the IRS to provide a prompt hearing at which the IRS must prove 'at least probable cause' for its claim." *Laing v. United States*, 423 U.S. 161, 187 (1976) (Mr. Justice BRENNAN, concurring).

The taxpayer would also be required to shoulder the burden of proof under either of the other alternatives proposed by the court below. It is clear that even if a refund suit can be maintained* the burden must be shouldered by the taxpayer who has lost his property. Moreover, the seeking of an injunction requires that a particularly difficult burden be placed on the taxpayer since he must show both irreparable injury and inadequacy of a remedy at law. Placing these burdens on the party whose property is seized

* One of the issues in this case is whether, under Texas law, a suit for a refund of personal property taxes improperly assessed and collected may be had without legislative permission. Prior to the court's dicta in the opinion below no Texas case recognized the availability of a refund suit absent legislative permission. It is undisputed, however, that there is no statute authorizing such an action.

through governmental action is not the intention of this Court. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 80, 85 (1972) (rejecting notion that due process is satisfied where the property owner could institute post-seizure suit to review propriety of deprivation).

But perhaps more significant than what the opinion under review says is what it fails to consider. The court below seems to presuppose that a taxpayer whose property has been seized is in a position to pay the disputed taxes under protest and then afford to begin the long legal battle to recover those taxes. Implicit in this view is that mere money is involved, not something critical to the livelihood of the taxpayer.

Many of the arguments advanced by the appellees have already been answered by this Court in another, but analogous, context. In *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), this Court required due process prior to the termination of utility service. Just as here, the governmental entity argued that "the available common-law remedies of a pre-termination injunction, a post-termination suit for damages, and a post-payment action for a refund are sufficient to cure any perceived inadequacy in" the utility's procedures. *Id.* at 19. The Court rejected this reasoning on the basis of its previous holdings in *North Georgia Finishing* and *Fuentes v. Shevin*, among others:

> Many of the Court's decisions in this area have required additional procedures to further due process, notwithstanding the apparent availability of injunctive relief or recovery provisions. It was thought that such remedies were too likely to be too bounded by procedural constraints and too susceptible of delay to provide an effective safeguard against an erroneous deprivation.

Id. at 20. The reasoning of the opinion below and adopted by the appellees to the effect that *this* action is all the process which these taxpayers are due is therefore unpersuasive. Although the tax claims asserted against the

appellants and the amicus are large and justify extensive constitutional litigation, most deliquencies are typically far smaller.[7] "Equitable remedies are particularly unsuited to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or bringing a lawsuit." *Id.* at 21. These observations are equally applicable here.

B. The Court Below and the Appellees Have Misread this Court's Holding in *Phillips v. Commissioner* Because it is Distinguishable From the Instant Case.

Critical reliance has been placed by both the appellees and the court below upon this Court's "carefully expressed" dicta in *Phillips v. Commissioner,* 283 U.S. 589 (1931). The impropriety of this reliance is revealed through the following analysis:

> [T]he *Phillips* case itself did not involve a jeopardy assessment and the taxpayer's assets could not have been taken or frozen in that case until he had either had, or waived his right to, a full and final adjudication of his tax liability before the Tax Court (then the Board of Tax Appeals). The taxpayer's claim in that case was simply that a statutory scheme which would permit the tax to be assessed prior to any *judicial* determination of his liability—by way of a refund suit or review of the Board of Tax Appeals' decision—was unconstitutional.

Commissioner v. Shapiro, 424 U.S. 614, 631 (1976) (emphasis in original). A careful review of the statutory scheme involved in *Phillips* demonstrates the marked contrast to that involved here. In *Phillips,* although there was a levy and seizure, the taxpayer was not under a danger of

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[7] When the collector began his seizure program in June of 1980, he began with the three largest tax deliquencies in Baxar County. The deliquency alleged against Querner was the largest, and that against Phillips the next greatest. In the ensuing weeks, more than 50 taxpayers had property seized pursuant to the statutes now under review.

losing his property until *after* judicial review of the claim of tax liability. Moreover, the "special need for very prompt action" taken pursuant to the "standards of a narrowly drawn statute" can exist only where that statute, like the one involved in *Phillips*, requires both an official determination that the particular seizure is necessary and justified *and* a statutory avenue for impartial judicial review of that official determination.[8] The Texas statute has neither of these touchstones.

C. The Collector, Now Interested in Delving into the Merits of the Tax Dispute, Should Have Allowed the Tax Suit to Proceed to Trial Rather than Taking the Short Cut of a Seizure.

As he has made abundantly clear, the collector is still attempting to litigate the merits of the deliquency dispute. He has suggested that it was the taxpayers' burden to show "the inaccuracy or illegality of the tax" in the present action. (Motion to Dismiss or Affirm at 4) But even assuming that the taxpayers owed all the taxes claimed and they had no valid defenses to payment,[9] "that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972).

This is neither the time nor the place for the taxpayers to

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[8] *Cf.* 26 U.S.C. § 6851(a)(1), which provides for the immediate assessment of taxes if "the Secretary finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom" or to take other actions "tending to prejudice or to render wholly or partially ineffectual proceedings to collect" taxes. This determination is subject to judicial review. 26 U.S.C. § 7429(b).

[9] Querner, for example, has a legitimate limitations defense the collector sought to cut off through a seizure. Brief of Amicus Curiae at 2, 9-10. Phillips alleged in its answer in the tax suit that it was being taxed for property it did not own.

present their defenses to the tax claims. That forum is in the tax collection suit brought by the collector which he has attempted to moot though the convenient contrivance of a seizure. What defense that he attempted to silence does he now want to hear? What issue that he attempted to stifle does he now want considered? Why did he seek to remove the controversy from the courts in the first place? The taxpayers cannot help but believe that the contentions that this is the proper forum to resolve the merits of the underlying dispute are but a ploy to direct attention away from the constitutional confrontation.

CONCLUSION

This appeal presents an important federal question involving the constitutionality of state tax collection procedures. The motion to dismiss or affirm itself suggests the need for plenary review; indeed, a summary reversal would be in order.

Respectfully submitted,

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